

CRIMINAL YEAR SEMINAR

March 16, 2012 - Tucson, Arizona

March 23, 2012 - Phoenix, Arizona

March 30, 2012 - Mesa, Arizona



MISCONDUCT IN THE COURTROOM: What Every Criminal Lawyer Needs to Know

Prepared By:

KAREN CLARK

Adams & Clark, P.C.

Phoenix, Arizona

Presented By:

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

1951 W. Camelback Road, Suite 202

Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

KIM MACEACHERN
STAFF ATTORNEY

And

CLE WEST

2929 N. Central, Suite 1500

Phoenix, Arizona 85012

Slide 1

**MISCONDUCT
IN THE COURTROOM:
WHAT EVERY CRIMINAL LAWYER
NEEDS TO KNOW**

APAAC – MARCH 2011
Presented by:
Karen Clark

© ADAMS & CLARK, PC

Slide 2

Topics for Today

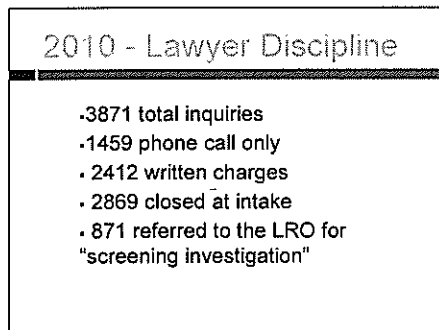
- The One Type of Conduct Every Prosecutor and Defense Counsel MUST avoid
- Criminal lawyers the State Bar is prosecuting
- Lessons: current prosecutor misconduct cases
- 5 Things every criminal lawyer should know about ethics in the courtroom

Slide 3

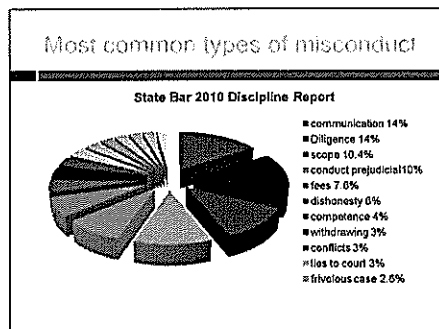
Who is the Bar after now?

Bar Prosecutions of Criminal Lawyers in the New Discipline System

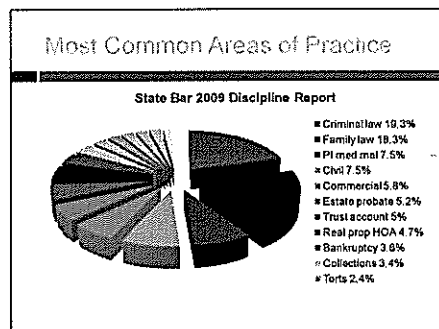
Slide 4



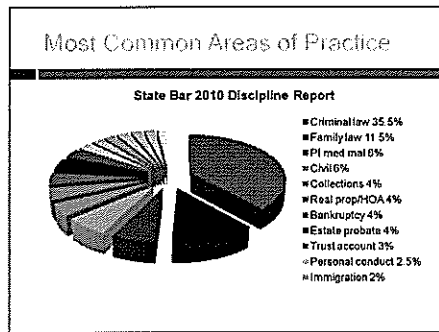
Slide 5



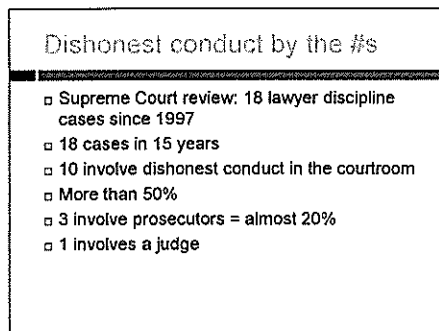
Slide 6



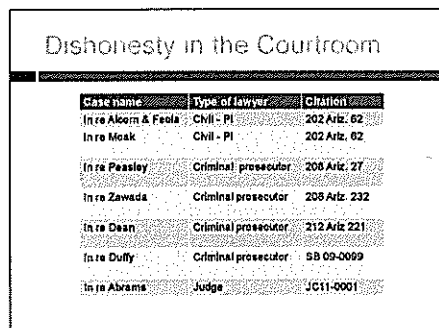
Slide 7



Slide 8



Slide 9

[illegible]

Slide 10

Dishonesty rules

- ER 3.3
- ER 4.1
- ER 8.4(c)

Slide 11

ER 3.3 – Candor to Tribunal

- L shall not knowingly:
 - make a false statement of fact/law
 - fail to disclose adverse legal authority
 - offer evidence L knows false. If offer evidence and come to know of its falsity, L shall take reasonable remedial measures, including, if necessary, disclosure to tribunal. L may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, L reasonably believes is false.

Slide 12

ER 4.1 – Truthful statements

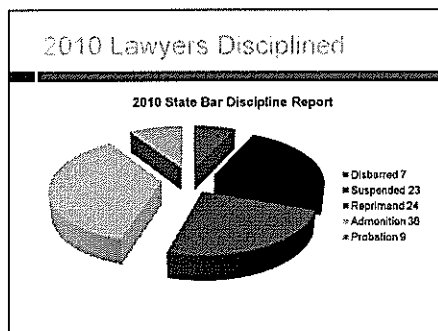
- In course of representing Client L shall not knowingly:
 - make a false statement of material fact or law to a third person; or
 - fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

Slide 13

ER 8.4(c) -- Truthful statements

- It is professional misconduct for L to
 - engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Slide 14



Slide 15

How *does* the bar and court decide what sanction to impose?

Slide 16

How *does* the bar decide what sanction to impose?


ABA Standards for Imposing Lawyer Discipline

- 1. Duty violated
- 2. Lawyer's mental state
- 3. Injury
- 4. Aggravating & Mitigating Factors

Slide 17

Defense Attorney Misconduct

Slide 18



Victim's Rights Statute violation, lies to court

Slide 19

SB 10-0022

- L represents C charged with multi counts of indecent conduct with minor
- L subpoenas minor's school records without notice to minor/victim, state or court motion
- L subpoenas minor's medical records and directs doctor to deliver to L
- Court rules subpoena was misleading
- At hearing, court asks re: records, L says he has no knowledge of their location

Slide 20

SB 10-1022

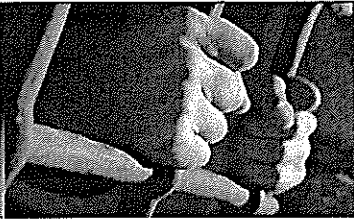
- Aggravation: multi offenses, vulnerable victim, substantial experience
- Mitigation: kitchen sink – no prior discipline, no dishonest motive, effort to rectify misconduct, cooperation with bar, other penalties or sanctions, remorse

Slide 21

SANCTION

- L consents to discipline, unrepresented
- L suspended for 60 days
- One year probation (CLE re: victim's rights)

Slide 22



Competence – the inaccurate criminal charge

Slide 23

SB 09-2339 – Count two

- L retained July 2009 to rep C – charged with Oxycodone for sale, Class 2 felony. State never files allegation drugs over threshold
- DRs – C sold 30 pills to informant
- By statute, that is less than threshold
- Went to RCC court. Plea offer: 6 months jail. Prosecutor mistakenly believed amount was over the threshold, so mandatory prison if trial

Slide 24

SB 09-2339 – Count two

- L advised C to take the offer. Believed prosecutor, and that prison time mandatory
- C rejects plea, fires L, hires new counsel
- Prosecutor goes to supervisor, catch mistake
- New offer: supervised probation. C accepts
- L paid \$6K, new counsel paid \$1500 to finish
- C asks for refund. L says he felt he earned fee

Slide 25

Findings

- Count 1: improperly documented business transaction with client #1
- Count 2: L failed to diligently and competently represent client #2

Slide 26

SANCTION

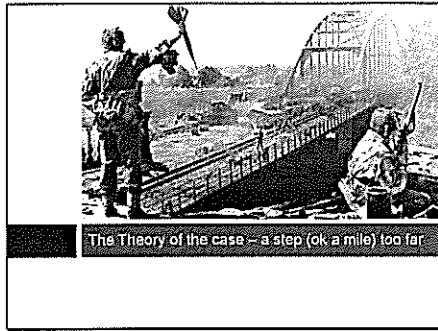
- Aggravation: prior discipline (60 day suspension in 2008 for unprofessional conduct); multiple offenses, lack of remorse, indifference in making restitution
- Mitigation: character/reputation (provides pro bono help to clients, veteran's assistance, participates weekly in military court
- Sanction: L suspended for 6 months

Slide 27

Another aggravation...

- In Count 2, L asserted that he had been competent and diligent
- For this reason, Hearing Officer found and additional aggravating factor:
 - "lack of remorse"

Slide 28



Slide 29

SB 09-1656

- o L reps C charged with Agg DUI, class 4
- o L convinced C will be convicted
- o L defense strategy: other person, same name
- o Tells C not to come to trial. If charged with FTA, L will represent him for free
- o Court asks L where client is
- o L does not reveal true facts
- o C convicted in absentia, and charged with FTA

Slide 30

SB 09-1658

- Aggravation: prior discipline, dishonest motive, substantial experience
- Mitigation: personal/emotional problems, cooperation with state bar, remorse

Slide 31

SANCTION

- L not represented
- L and State Bar stipulate to facts, violations
- Hearing on sanction only
- L suspended for one year, two years probation

Slide 32

Prosecutor Misconduct

Slide 33

Zawada, 208 Ariz. 232

- Def's first degree murder conviction reversed based on lawyer's misconduct, double jeopardy

Slide 34

Zawada's misconduct

- appealing to fear of jury if def not convicted
- disrespect and prejudice re: mental health experts; harassment and insults during cross examination
- repeated improper argument to the jury

Slide 35

Zawada - sanction

- Hearing Officer = Reprimand 6 mo. probation
- Disciplinary Commission = Censure, no probation, added MAP referral
- Sup Ct = *sua sponte* review - 6 mo. + 1 day suspension, requiring reinstatement

Slide 36

Reinstatement: what's required



Slide 37

Arrotta, 208 Ariz. 509

- For reinstatement L must show "rehabilitation"
- Burden of proof = clear & convincing evidence
- Court "L must affirmatively show he has overcome those weaknesses that produced his earlier misconduct, i.e. whether he has been rehabilitated".

Slide 38

Peasley, 208 Ariz. 27

- Prosecutor lied and used false testimony to convict 3 defendants in first degree murder case
- Conduct repeated in 2 separate trials, 4 years apart – defs sentenced to death
- One def. acquitted when misconduct came to light; other def.'s conviction dismissed with prejudice based on double jeopardy, due to prosecutor's egregious misconduct.

Slide 39

Peasley - sanction

- Hearing Officer = 60 day suspension
- While HO recommendation pending, Sup Ct issued opinion in *State v. Minnitt*
- Disciplinary Commission = disbarment
- Supreme Court agreed with Disciplinary Commission, and disbarred Peasley

Slide 40

Formal Cases – New system

- Trials - three-person panels
 - Presiding Disciplinary judge
 - Volunteer attorney
 - Volunteer public member

Slide 41

Formal Cases – New system

- Hearing Panel has authority to impose final sanctions, including disbarment
- All decisions final, unless appealed
- No intermediate review (DC gone)
- Direct appeal to Supreme Court

Slide 42

Dean, 212 Ariz. 221

- Prosecutor & judge had romantic relationship
- Judge regularly presided over felony cases in which prosecutor appeared
- During relationship prosecutor appeared in court before judge 485 times.
- SBA investigation: prosecutor denied the relationship. Case dismissed
- H videotaped them: resubmitted to SBA

Slide 43

Dean - sanction

- Hearing officer = 6 month suspension
- Disciplinary Commission = 1 year suspension
- Supreme Court took review
- Issue for Court concerned the discipline the judge received, "proportionality"
- Sup Ct sanction = 6 month suspension

Slide 44

In re Abrams: JC 11-0001

- Judge sexually harassed 3 female lawyers
- Sexual relationship with one of them, who appeared regularly in his court
- Sanction
 - censured as a judge.
 - 2 year suspension as a lawyer
- Sup Ct Opinion

Slide 45

Duffy, SB 09-0099

- 4 month capital murder trial
- Prosecutor violated court orders, made improper arguments; def. motions for mistrial
- Trial court denied def. motions, held arguments didn't deprive def. of fair trial
- Trial court filed bar charge

Slide 46

Duffy - sanction
<ul style="list-style-type: none">□ Hearing Officer = 9 violations: 3 in opening, 1 in closing, 5 during trial□ Hearing Officer = 30 day suspension, 1 year probation, 15 hours CLE (10 in trial ethics)□ Disciplinary Commission = 6-2 vote: same (dissenting opinion filed)□ Supreme Court = declined review, same sanction

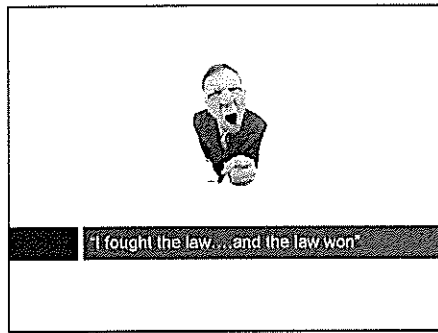
Slide 47

Duffy - dissent
<ul style="list-style-type: none">□ Hearing Officer mistaken re: L's mental state□ Prosecutors errors in long, heated jury trial do not warrant more than a censure

Slide 48

Unprofessional conduct, disrespect to courts
Should rude lawyers be sanctioned?

Slide 49

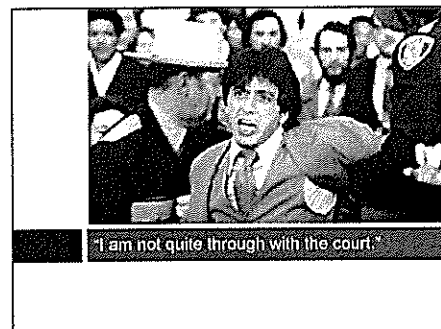


Slide 50

The case of the angry lawyer

- L represents C in civil traffic case
- Prosecutor disagreed with L's position
- L stood up quickly, moved toward the prosecutor, yelled at her to "shut up"
- Prosecutor asked for contempt: L said "GD it!"
- Judge says ruling is final

Slide 51



Slide 52

The Purpose of Lawyer Discipline

- "To Protect the Public"
- "Not to punish the lawyer"
- But – Lawyers can be disciplined for what they do strictly in their personal lives

Slide 53

SANCTION SB 09-1781

- L was previously disciplined (2002 censure - unprofessional conduct x3 counts and 2007 censure - ER 1.3, 1.4 and 3.1(one client)
- Sanction: 6 month suspension

Slide 54

Arizona – public & published

SANCTION	Public	Magazine & press release	Website
Intake dismissal	YES - 6 mo	NO	NO
Screened dismissal	YES - 6 mo	NO	NO
Diversion	NO	NO	NO
Probation	YES	NO	YES - 5yrs
Admonition	YES	NO	NO
Admonition with Probation	YES	NO	YES - 5yrs
Reprimand/Susp/Disbarment	YES	YES	YES - forever

Slide 55

AZ vs. CO –what is public		
	ARIZONA	COLORADO
Dismissals	Public for 6 months	Private
Diversion	Private	Private
Probation	Public (& published 5yr)	Private
Admonition	Public	Private
Admonition with prob.	Public (& published 5yr)	Private
Reprimand and up	Public (& published ~)	Public (& published ~)

Slide 56

Pending prosecutor cases

What are the lessons to be learned?

Slide 57

ER 5.1 Duties of Superiors

- reasonable efforts to ensure measures to assure subordinate lawyers are ethical
- Direct supervisors shall make reasonable efforts to ensure subordinate L ethical
- Superiors responsible for subord misconduct if
 - Ordered or ratified conduct; or
 - knew of conduct at a time when consequences could be avoided or mitigated and failed to take reasonable remedial action

Slide 58

ER 5.2 – Subordinate's Duties

- L is bound by ERs notwithstanding that L acted at the direction of another person.
- Subordinate L does not violate ERs if L acts in accordance with a supervisor's reasonable resolution of an arguable question of professional duty.

Slide 59

ER 5.2 – Comment 2


- "When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken."

Slide 60

5 things every criminal lawyer should know


About ethics in the courtroom

Slide 61




1. Be scrupulously honest

Slide 62



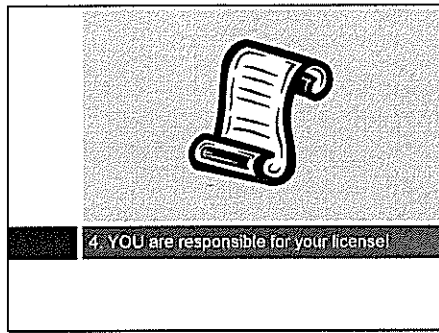
2. Be Professional

Slide 63

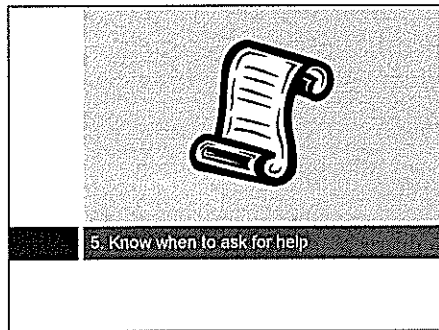


3. Avoid inappropriate personal relationships

Slide 64



Slide 65



Slide 66

